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No. 86-1858

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, AND LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
PETITIONERS,

v.

ALLIED INTERNATIONAL, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I

List of Parent, Subsidiary and Affiliated Corporations, Pursuant to Rule 28.1

Allied International, named as respondent herein, sold all its assets to Allied Plywood Corporation on April 29, 1981. Allied Plywood Corporation transferred its assets to APC Liquidating Trust during 1986.

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In the
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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, AND LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
PETITIONERS,

v.

ALLIED INTERNATIONAL, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Court of Appeals for the First Circuit in this case.

Statutes Involved

1. Rule 15(a) of the Federal Rules of Civil Procedure provides:

> AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

2. Rule 15(c) of the Rules of Civil Procedure provides in relevant part:

> RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Statement of the Case

The petitioner makes an incomplete statement of the action and therefore, respondent makes its own statement of the case.

In January, 1980, the International Longshoremen's Association ("ILA") began its boycott of all incoming or outgoing Soviet cargo. The ILA's boycott caused continuing harm to the Russian wood importing business of Allied International, Inc. ("Allied International"). Allied International filed this action in March, 1980 for the ongoing damages. Allied International claimed it had been "damaged in the amount of $5 million dollars to date and face[d] prospective damages of upwards of $10 million dollars." *See,* ILA Petition ("Pet.") at 10a.

The district court dismissed the complaint for failure to state a claim upon which relief could be granted. 492 F.Supp. 334 (D. Mass. 1980). The Court of Appeals for the First Circuit reversed. 640 F.2d 1368 (1st Cir.-1981). After granting certiorari, this Court unanimously held that the conduct of the ILA was an illegal secondary boycott. 456 U.S. 212 (1982). On remand, the district court entered partial summary judgment against the ILA on the issue of liability. 554 F.Supp. 32 (D. Mass. 1982).

Unrelated to the ILA's illegal boycott, Allied International, along with a group of related corporations, sold all of its assets to Allied Plywood Corporation ("Allied Plywood") on April 29, 1981. As part of this transaction, Allied International expressly assigned its claim in this action against the ILA to Allied Plywood. No change occurred in the business or management of Allied Plywood. The operation continued as before, uninterrupted.

On June 12, 1985, Allied International moved to amend the complaint in order to substitute Allied Plywood for Allied International as plaintiff. The district court allowed plaintiff's motion, and the ILA never answered or otherwise responded to the amended complaint.

After an October, 1985 trial on damages, the district court entered judgment in September, 1986 for $8,055,490 plus pre-judgment interest. On March 23, 1987, the Court of Appeals for the First Circuit affirmed the district court's opinion in full. The First Circuit denied the ILA's request for rehearing in banc on April 22, 1987.

Reasons the Petition Should Be Denied

I. This Case Represents a Straightforward Application of Rule 15 of the Federal Rules of Civil Procedure.

Federal Rule of Civil Procedure 15 fully resolves the issues raised by the ILA in its petition. The ILA's petition presents no important question of federal law, shows no departure from the accepted and normal course of judicial proceedings, and does not establish any division among federal circuits on any issue.

The ILA argues that it was deprived of due process and its right to a jury trial when the district court granted recovery on the claim by Allied Plywood that was purportedly never asserted and expressly renounced. Pet. at 10-11. The ILA's contention misstates the record, ignores the pleadings in this action, and disregards the Federal Rules of Civil Procedure. Both the original and amended complaints notified the ILA as to all claims asserted against it. Further, the ILA received a full hearing on the question of whether Allied Plywood was entitled to assert a claim for damages.

The district and circuit courts considered at length whether the amendment naming Allied Plywood should "relate back" under Rule 15(c) to the time of filing of the original complaint. Whether relation back should be allowed is based on considerations of "fairness" to the defendant. In holding that the amended complaint properly related back to the time of filing of the original complaint, both courts determined that the claims asserted against the ILA in the original and amended

complaints were essentially identical, that extensive discovery both well before and after the amendment notified the ILA of the damages claimed, that at trial the ILA asserted full defenses to all damages claimed, and that the ILA knew of all claims asserted against it.

Accordingly, the ILA fails to raise any issue of due process since it had every opportunity to contest, and defend against, all claims made. Given the extensive consideration by the courts below, the petition of ILA does not raise any issue of due process.

A. *Federal Rule of Civil Procedure 15 Was Properly Applied in This Case.*

On June 12, 1985, the district court allowed Allied International's motion to amend the complaint naming Allied Plywood as plaintiff. Allied International sold all of its assets and assigned its claim for damages against the ILA to Allied Plywood. The ILA objected to the district court's order, claiming the amendment somehow "changed the party, not just the name" of the plaintiff and that "this was a very different situation." *See* Pet. at 30a.

Rule 15(a) makes the well-known admonition that leave to amend "is to be freely granted when justice so requires." Fed. R. Civ. P. 15(a). This court has noted that the mandate of Rule 15(a) is to be heeded and that, absent such circumstances as undue delay, bad faith or undue prejudice, amendment is to be allowed. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962); *see also, Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148 (1964); *U.S.* v. *Hougham*, 364 U.S. 310 (1960). Absent fundamental unfairness to the opposing party, the grant or denial of leave to amend is entirely within the discretion of the trial court. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). The circuit court here found that the district court did not abuse its discretion in allowing this amendment.

Once the district court properly allowed the amendment, no further inquiry is necessary, assuming Allied Plywood merely continued to assert the claim of Allied International. If, however, Allied Plywood asserted a new and separate claim, as the ILA contends and the circuit court assumed for purposes of deciding the case, the second issue is whether Allied Plywood's amended complaint should relate back to Allied International's original claim in order to avoid the applicable three year limitation period. *See* Mass. Gen. Laws ch. 260, § 2A. A new claim, if it is to relate back, must arise from the same conduct, transaction or occurrence set forth in the original complaint. Fed. R. Civ. P. 15(c). The Rule also states that where a new defendant is added the amendment will relate back if the new defendant received notice of the action prior to the running of the statute of limitations and is not prejudiced in maintaining its defense. Although Rule 15(c) does not expressly treat the problems of substituting plaintiffs since it is "generally easier," the same approach mandated for naming new defendants is to be applied to plaintiffs. Fed. R. Civ. P. 15(c), Notes of Advisory Committee on Rules, 1966 Amendment.

An amendment substituting a new plaintiff should be allowed to relate back where the new claim arises out of the same conduct as the original complaint and where consequently there is no prejudice to the defendant in defending that claim. *See, e.g., Verdi* v. *City of Philadelphia*, 553 F.Supp. 334, 339 (E.D. Pa. 1982); *De Franco* v. *United States*, 18 F.R.D. 156 (S.D. Cal. 1955). In particular, where the plaintiffs in the original and amended complaint are found to have an "identity of interest" so that the same conduct of the defendant is at issue in both the amended and original complaint, the amendment is allowed to relate back as a matter of course. *See Staren* v. *American National Bank & Trust Co. of Chicago*, 529 F.2d 1257 (7th Cir. 1976); *Hill* v. *BASF Wyan-*

dotte Corp., 782 F.2d 1212 (4th Cir. 1986); *Raynor Bros.* v. *American Cyanamid Co.*, 695 F.2d 382 (9th Cir. 1982); *Warpar Mfg. Corp.* v. *Ashland Oil, Inc.*, 102 F.R.D. 749 (N.D. Ohio 1983); *Unilever (Raw Materials) Ltd.* v. *M/T Stolt Boel*, 77 F.R.D. 384 (S.D. N.Y. 1977). Based on this substantial and well-accepted body of law, the district court held that the amendment related back pursuant to Rule 15(c).

Having reviewed the record extensively, the circuit court found that Allied Plywood and Allied International each asserted a claim arising from the ILA's wrongful secondary boycott of Russian cargo. *Allied International, Inc.* v. *International Longshoremen's Association*, 814 F.2d 32, 37 (1st Cir. 1987). The court further concluded that the ILA had been on notice, both from the original complaint and from the extensive discovery taken, that the plaintiff was claiming all lost profits attributable to the illegal boycott. *Id.* As between Allied Plywood and Allied International there was an "identity of interest" with the only difference between their claims being a temporal one. *Id.* at 36. Hence, the ILA was not prejudiced in defending against Allied Plywood's claim.

Accordingly, the amendment naming Allied Plywood as plaintiff was allowed to relate back to the time when Allied International filed the original complaint. There is no important question of federal law and no departure from the accepted course of judicial proceedings.

B. *There Was No Prejudice to the ILA From the Actions or Statements Made During Hearings by the District Court.*

In order to remove the case from the procedural boundary of Rule 15, the ILA asserts that the district court actually misled petitioner at the hearing on the amendment by stating that Allied Plywood was named as an "assignee" of Allied International and was not asserting a claim "in its own right". Pet. at 10-11. The record refutes the ILA's argument which is also legally baseless.

The ILA incorrectly characterizes the district court's statement. Under the ILA's scenario, the district court somehow limited the amendment, but then subsequently reversed itself by expanding the effect of such amendment.[1] In fact, the district court pointed out to the ILA that the relevant issue was whether the original and amended plaintiffs were sufficiently related so as to allow Allied Plywood to assert a claim. The district court did not limit the amendment.

Far from being unfairly surprised, the ILA argued throughout the trial that the district court should confine Allied Plywood's claim to only those damages as "assignee" of Allied International. On the first day of trial, the ILA made a motion to "limit claim" and moved to preclude plaintiff from introducing any evidence of damages after April, 1981. The district court stated that counsel would be heard on the matter at the close of evidence. *See* Appendix at A-1 - A-4. The ILA made continuing objections during the trial on this point. *See* A-5 - A-7. At the close of testimony, the ILA presented its argument in toto. *See* Appendix at A-8 - A-16.

Rationalizing that the district court deceived the ILA also distorts the appropriate functions which counsel, the court, and pleadings respectively perform. The purpose of a pleading, including an amended complaint, is to notify a defendant of the claims asserted against it. *See* Fed. R. Civ. P. 8(a). The ILA argues that notwithstanding the express language of the amended complaint, it was never notified of Allied Plywood's claim, due to the district court's purported

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[1] A reading of the colloquy itself demonstrates that the ILA's contention is plainly false. The district court stated:

> If they want to substitute this outfit as a plaintiff, and you find they don't have a recoverable interest, then you win, so what are you complaining about?

And subsequently:

> If you find there isn't continuity of interest, then you make your motion for a directed verdict and you walk out smiling.

See Pet. at 30a-31a.

disclaimer. The ILA would, in effect, create a right for counsel to "negotiate" the meaning of an amendment with the judge and then to ignore the plain language of the amended complaint.

The amendment of the complaint substituted Allied Plywood as plaintiff and notified the ILA of Allied Plywood's claim. By way of answer or motion to dismiss the ILA could have contended that Allied Plywood was not a proper party to assert a claim. The ILA, however, failed to answer or otherwise respond to the amended complaint.[2] Failing to mention, let alone explain, such gross omission on its part, the ILA now claims that it was constitutionally deprived of an opportunity to raise defenses to Allied Plywood's claim.[3]

The district and circuit courts concluded that it was fair for the ILA to defend against Allied Plywood's claim. Both courts found that the original and amended complaints by their express terms state a claim for all lost profits caused by the boycott. As early as 1983, Allied informed the ILA in discovery that plaintiff was seeking lost profits until 1986. Even after the amendment in June 1985, extensive discovery was taken as to damages through 1989 and beyond. At trial, the ILA asserted defenses against all damage claims, its protestations to the con-

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[2] The ILA's failure to raise the statute of limitations by motion or as an affirmative defense to Allied Plywood's claim means that the defense was waived. Fed. R. Civ. P. 8(b). Notwithstanding this waiver, the issue was raised by motion to preclude evidence at trial and both the district court and the circuit court gave full consideration to the defense that Allied Plywood's claim was time barred. The courts then rejected the defense pursuant to Rule 15(c).

[3] In addition to arguing that it was unable to assert its defenses, the ILA contends that it was deprived of a jury trial by the amendment of the complaint. The ILA never claimed a jury trial in response to either the amended or original complaints. The failure to claim a jury trial in a timely fashion means the right is waived. Fed. R. Civ. P. 38(b). The ILA's excuse for this waiver is again that it did not know that it was facing a new claim in the amended complaint. Such a statement was rejected by the First Circuit and ought not to be countenanced by this Court.

trary. The original complaint fully notified the ILA of all claims against it. As such, there exists no prejudice.[4]

The district court considered all of the factors now raised by the ILA in deciding to allow relation back of the amendment of the complaint. The circuit court reconsidered the question, and found that there was no abuse of discretion. Both courts decided that it was procedurally "fair" for the ILA to defend against the claim of Allied Plywood, since that claim was in substance identical to the claim of Allied International and the ILA had known of the claim from the inception of the lawsuit. Both courts made this analysis under Rule 15(c), despite the failure of the ILA to raise its objection that Allied Plywood's claim was barred in a procedurally proper manner. The ILA has not been deprived of due process, and the courts below have not departed from ordinary judicial proceedings.

II. The Opinion of the First Circuit Creates No Conflicts Between the Circuit Courts.

The ILA asserts that the decision of the First Circuit conflicts with prior decisions of other circuit courts. Such conflicts do not exist.

A. *The First Circuit Did Not Grant Recovery on a "Claim Never Asserted".*

The ILA maintains that a conflict between the circuits exists because the First Circuit granted relief in this case on what the ILA calls a "claim never asserted." Pet. at 9. The notion that the First Circuit granted relief on any unasserted claims is wholly without substance. *See* Part I *infra*.

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[4] District court opinion, Pet. at 37a-39a; circuit court opinion, 814 F.2d at 34-38.

Each case cited by the ILA for the proposition that recovery may not be had on a claim "never asserted" deals with recovery where trial is held upon claims not included in the pleadings. *See*, Pet. at 13-14. These cases hold that even where a claim is unpled, under certain circumstances the complaint may be amended to "conform to the evidence" pursuant to Federal Rule of Civil Procedure 15(b).

However, no question of the application of Rule 15(b), or of unpled claims, arises here. The only claim upon which recovery was granted was unequivocally stated and pled in both the original and amended complaints. There were no unasserted or unpled claims. Consequently, there is no question of amending any complaint to conform to the evidence," or to include claims previously unpled or "unasserted".

No conflict exists between courts addressing different issues. The propriety under Rule 15(b) of allowing recovery where claims have not been pled is an entirely separate question from allowing a claim in an amended complaint to relate back to the time of filing of an original complaint. As such, the ILA's attempt to manufacture a conflict between the circuits must fail.

B. *Allied International Did Not "Voluntarily Cease Business".*

The ILA maintains that another conflict exists between this decision and prior decisions of other circuit courts, in that the First Circuit granted recovery for damages to Allied International after its "voluntary cessation of business". Pet. at 15. The ILA's portrayal that Allied International "voluntarily ceased" business is fallacious. As the district and circuit courts found, the Russian wood importing business never ceased, nor was it even altered. Rather, the business was transferred to a new owner and continued operation as before. *See* Pet. at 38a; 814 F.2d at 34-35.

Again, the ILA endeavors to fabricate a conflict between circuits. This case does not address the central issue in the line of cases arising from *Pollock & Riley, Inc.* v. *Pearl Brewing Co.*, 498 F.2d 1240 (5th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975). In *Pollock & Riley* and its progeny, the plaintiff actually ceased business activity, generally as a result of the defendant's wrongful conduct. These decisions held that the plaintiff could not recover for *both* the diminished sales price of his business and future lost profits.

The *Pollock & Riley, Inc.* type of cases are inapplicable here. There is no question of double recovery in this case. Only lost profits for the continuing business, but no diminished sales price, were sought as damages.

The ILA also references such cases as *Farmington Dowel Products Co.* v. *Foster Mfg. Co., Inc.*, 421 F.2d 61 (1st Cir. 1969) as conflicting with the present case. The referenced decisions invalidate as too conjectural any method of calculating lost profits where a profit record is lacking. Such a principle does not conflict with the damages as determined in this case where the award of lost profits was based on a record of continuing actual profits. 421 F.2d at 81 n.46.

Therefore, the cases cited by the ILA either are plainly distinguishable from the case at bar, or only serve to support the damage principles in the First Circuit's decision. No conflict between the circuits exists.

C. *The First Circuit Established No Rule of Law as to the "Continuity of the Business".*

The First Circuit held in this action that there was a sufficiently close "identity of interest" between Allied International and Allied Plywood, so that the amended complaint of the latter should relate back under Rule 15(c). The ILA takes issue with this holding and maintains it is in direct conflict with the holding of the Eleventh Circuit in *Bud Antle, Inc.* v. *Eastern Foods, Inc.*, 758 F.2d 1451 (11th Cir. 1985) and other like cases.

Bud Antle does not implicate Rule 15(c), the relation back of an amended complaint, or the identity of interest test. Rather, *Bud Antle* decides the nature and extent of the "de facto merger" and "mere continuation" doctrines under Georgia law. The de facto merger and mere continuation doctrines relate to the assumption by a corporation of the liabilities and torts of its predecessor under state corporate law. These doctrines do not concern Rule 15(c) and the question of when an amendment asserting a claim on behalf of a new plaintiff properly relates back to the time of filing of the original complaint. There is no conflict between *Bud Antle* and this case.

Further, each of the cases cited as being in conflict with the First Circuit's holding as to an identity of interest is a case decided under state law regarding the assumption of corporate liabilities. *See Bud Antle, Inc.* v. *Eastern Foods, Inc.*, 758 F.2d 1451 (11th Cir. 1985) (construing Georgia corporate law); *Leannais* v. *Cincinnatti, Inc.*, 565 F.2d 437 (7th Cir. 1977) (construing Wisconsin corporate law); *Kemos, Inc.* v. *Bader*, 545 F.2d 913 (5th Cir. 1977) (construing Georgia corporate law); *Acheson* v. *Falstaff Brewing Corp.*, 523 F.2d 1327 (9th Cir. 1975) (construing California corporate law).

D. *The First Circuit States No New Policy for Secondary Boycott Claims.*

In closing its petition, the ILA argues that the First Circuit adopted a new policy that somehow expands liability in claims arising under § 303 of the Labor Management Relations Act. 29 U.S.C. § 187 (1982). This case does no such thing.

The First Circuit held that the complaint of Allied Plywood should relate back to the time of filing of the original complaint pursuant to Fed. R. Civ. P. 15(c). This straightforward application of Federal Rule of Civil Procedure 15(c) does not touch upon any questions as to liability in a Section 303 claim, and therefore cannot have "far-reaching ramifications for national labor law."

Conclusion

For the reasons stated herein, the Petition for a Writ of Certiorari to the First Circuit Court of Appeals in this case should be denied.

Respectfully submitted,

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Dated: June 25, 1987

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA. No. 80-0584-S

ALLIED PLYWOOD COMPANY

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

SKINNER, D.J.

FIRST DAY OF NONJURY TRIAL

APPEARANCES:

NUTTER, MCCLENNEN & FISH (by Attorney Danielle E. deBenedictis, Michael T. Cetrone, Esquire and Stephen Break, Esquire), 600 Atlantic Avenue, Boston, MA 02110, on behalf of the Plaintiffs.

LAW OFFICES OF THOMAS W. GLEASON (by Charles R. Goldburg, Esquire, and Ernest L. Mathews, Jr., Esquire), 90 Broad Street, Suite 600, New York, N.Y., 10004, on behalf of the Defendants.

Courtroom No. 3
Federal Building
Boston, Massachusetts
October 15, 1985
9:30 a.m.

* * *

[7] Ms. DeBENEDICTIS: All right.

I have a second motion in limine that I also filed on Friday with respect to preclusion of evidence as to the April 4, 1981, purchase of Allied by Seidler.

My brother's trial brief, which he filed on Friday, refers in large part to this acquisition by Seidler of Allied. You have already twice before decided this issue when you allowed my motion to amend the complaint—

THE COURT: I allowed your motion to amend the complaint on the representations that you made. Now, if they turn out to be not true—and there has not been on the facts such as to warrant a finding of continuity—then the results will be different. I am not going to preclude introduction of evidence. We have never had an evidentiary hearing, and I don't see why the defendants should be precluded from having one.

We had your representation, I think a couple affidavits back and forward. But nothing conclusive. You make a representation for purposes of pleadings. Your amendment is going to be allowed. If it turns out not to state the truth, why, then, you are in trouble.

Ms. DeBENEDICTIS: We also briefed the legalities of the issue as to why who owns the claim and if in fact the claim has transferred has nothing to do what profits and sales numbers were.

[8] THE COURT: It may have to do with the period of profits and sales to which you are entitled.

Ms. DeBENEDICTIS: I will leave that for the Court's decision after you have heard the evidence.

THE COURT: I think that would be an excellent idea.

Ms. DeBENEDICTIS: That is it, your Honor, and I am now prepared to make an opening.

THE COURT: All right.

MR. MATHEWS: Could we be heard for a moment on housekeeping or pretrial motions?

THE COURT: Sure.

MR. MATHEWS: We had planned to make some ad limine motions orally going to the question of the continuity of Allied Plywood Corporation with Allied International. I would understand from what has been said that you are not going to rule on that now.

I wonder if I could just put on the record what our motions would be?

We would move to preclude any evidence with respect to lost profits by Allied Plywood Corporation after the date of the acquisition. That is Allied's cause of action in its own right, as opposed to an assigned cause of action.

We would move to preclude any evidence with [9] respect to the eight nonparty corporations, who it appears the plaintiffs are going to seek damages on behalf of. Those are related corporations to Allied International who just never have been plaintiffs in this action, but somehow their sales have gotten lumped, at least into the discovery, into the calculations of damages.

THE COURT: Well, if they funnel into the plaintiff and the plaintiff lost revenue by that—

MR. MATHEWS: When you hear the evidence, I don't think that's the case.

THE COURT: If that's not the case, that's not the case. If it is the case, it is the case. It is up to the plaintiffs to prove it.

MR. MATHEWS: We would also move to preclude any evidence with respect to damages to Allied International, Inc., after the date it went out of business.

THE COURT: Well, I think that's right. Damages would go out, would go to whoever picked up the business, if they are shown to be related to this circumstance.

MR. MATHEWS: And, finally, we would move to preclude any evidence with respect to damages on the sale of non-Russian products which has crept into the discovery.

THE COURT: They have to tie it in.

You see, all this business, all this evidentiary business at the start of the trial is basically [10] a waste of time. I can't possibly rule on these matters until I hear the evidence. If they can, if the plaintiff satisfactorily ties in loss of revenue from other matters, for all I know, there may have been some connection between these sales and others. I suppose if they were

tied sales and violating antitrust laws, I doubt that they can claim, successfully claim, loss of profits of something of that kind. They can't profit from illegal conduct.

I don't know what is going to happen here.

MR. MATHEWS: I understand.

THE COURT: That's what we have trials for.

MR. MATHEWS: Right.

With respect to the plaintiffs ad limine motion with respect to collateral estoppel, we got their papers over the weekend, and if you are going to rule on this motion as a motion, we would like a chance to put in a response.

THE COURT: Sure.

MR. MATHEWS: I have our trial brief. We did not file it with the Clerk's Office today.

THE COURT: Send it up.

MR. MATHEWS: Finally, your Honor, we would like to move that during the course of the trial that all witnesses be excluded from the courtroom except the parties and their experts.

* * *

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA. No. 80-0584-S

ALLIED PLYWOOD COMPANY

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

SKINNER, D.J.

FIFTH DAY OF NONJURY TRIAL

APPEARANCES:

NUTTER, MCCLENNEN & FISH (by Attorney Danielle E. deBenedictis, Michael T. Cetrone, Esquire and Stephen Break, Esquire), 600 Atlantic Avenue, Boston, MA 02110, on behalf of the Plaintiffs.

LAW OFFICES OF THOMAS W. GLEASON (by Charles R. Goldburg, Esquire, and Ernest L. Mathews, Jr., Esquire), 90 Broad Street, Suite 600, New York, N.Y., 10004, on behalf of the Defendants.

-and-

LECOMTE, BARBER, EMANUE'SON, TICK & DOYLE (by Joseph T. Doyle, Esquire), One Boston Place, Boston, MA 02108, on behalf of the Defendant.

Court of Appeals Courtroom
Federal Building
Boston, Massachusetts
Monday, October 21, 1985
9:15 a.m.

[5-11] MR. GOLDBURG: All right. Thank you.

THE COURT: He couldn't have made it more clear.

Now, do we want to press on with Mr. Gillis?

Ms. DeBENEDICTIS: I just have one thing in the nature of housekeeping, your Honor.

THE COURT: All right.

Ms. DeBENEDICTIS: I noticed in the back of the daily transcripts I am getting, although I had moved Exhibits 1 through 12, which are summaries of the various losses on the individual slips, although I moved them in, and I believe you have them all in front of you, somehow the transcripts shows only Exhibits 1, 6 and 12 were admitted.

THE COURT: I only show Exhibit 1 being admitted.

Ms. DeBENEDICTIS: I had moved Exhibits 1 through 12.

Could I move them now, if I didn't? Could I move them now?

THE COURT: Any objection to Exhibits 1 through 12?

MR. GOLDBURG: I have a couple of statements that I would like to make.

THE COURT: Never mind that. Do you have an objection to the admission of Exhibits 1 through 12?

[5-12] MR. GOLDBURG: Three of them, Judge, yes.

THE COURT: Which ones are they?

MR. GOLDBURG: I believe, Judge, Exhibit 10 refers to PROFESSOR RYBALTOVSKY—

THE COURT: That is what it says here.

MR. GOLDBURG: We would assert an objection to PROFESSOR RYBALTOVSKY on the grounds that that ship arrived in Montreal after the sale of assets. It was prior to the announcement of the end of the boycott, but it was after the sale of assets, and we take the position that any out-of-pocket claim on the RYBALTOVSKY would have accrued to Allied

Plywood rather than Allied International; and therefore, it would not pass, by virtue of the assignment from Allied to International, to Allied Plywood.

THE COURT: Well, it would have been a liability, would it not? If the out-of-pocket was owed, the new corporation picked up the liability of the old, did it not?

MR. GOLDBURG: I don't think it would be a liability. these are out-of-pocket expenses that were incurred after the sale of the assets, your Honor. Any liability would have accrued after the sale of assets.

THE COURT: That is all right. That is a loss to this plaintiff.

MR. GOLDBURG: But—I guess we can argue [5-13] that.

THE COURT: Your position, I have heard you allude to this, and I have a great deal of trouble with your position; but, rather than try to follow the ins and outs of the argument at this stage, I am going to admit the exhibit and then at the end, if you persuade me that I should not allow any damages on that ground, well, then I won't.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA. No. 80-0584-S

ALLIED PLYWOOD COMPANY

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

SKINNER, D.J.

TWELFTH DAY OF NONJURY TRIAL

APPEARANCES:

NUTTER, MCCLENNEN & FISH (by Attorney Danielle E. deBenedictis, Michael T. Cetrone, Esquire and Stephen Brake, Esquire), 600 Atlantic Avenue, Boston, MA 02110, on behalf of the Plaintiffs.

LAW OFFICES OF THOMAS W. GLEASON (by Charles R. Goldburg, Esquire, and Ernest L. Mathews, Jr., Esquire and Kevin Marrinan, Esquire), 90 Broad Street, Suite 600, New York, New York 10004.

and

LECOMTE, BARBER, EMANUELSON, TICK & DOYLE, (BY JOSEPH T. DOYLE, ESQUIRE), One Boston Place, Boston, MA 02108, on behalf of the Defendant.

Court of Appeals Courtroom
Federal Building
Boston, Massachusetts
Wednesday, October 30, 1985
9:45 a.m.

* * *

[12-79] Ms. DeBENEDICTIS: So shall we move on to the next motion?

THE COURT: Let's go on to the next one.

Ms. DeBENEDICTIS: Actually, your Honor, this is our response to their position to objecting to the scope of our claim, and we filed a motion in limine that said we wanted to preclude them from being able to attack the transfer of assets as being a cutoff date, et cetera, and, again, you said let's hear the evidence and we'll see what happens afterward.

I filed a brief with you on it before. I think it is very clear from the case law that when a company transfers its assets, even if it doesn't purport to transfer the claim, the claim is transferred with those assets. However, here in the paperwork we did transfer the claim. Allied International transferred the claim to APCO and APCO later on became Allied.

THE COURT: I think the issue is a little [12-80] more refined than that, because you started off with Allied International, and the only claims that were available to Allied International were Allied International's claims.

Now, when Allied Plywood is substituted and I allowed the amendment, and I don't think there is any problem with that, Allied Plywood Corporation, the new corporation, became the new plaintiff. And then a question comes about in relation to that, I suppose, because that amendment wasn't made until when, 19—

Ms. DeBENEDICTIS: It was made in the spring, your Honor.

MR. MATHEWS: June of '85.

THE COURT: June of '85. I don't know whether that was beyond the limitations period, whether the limitations period applied on a Section 301.

Ms. DeBENEDICTIS: I don't know, your Honor. I would have to check.

MR. MATHEWS: Well, that is an issue that is uncertain. There are petitions throughout.

Generally, you look to the analogous state law.

THE COURT: Six year statute?

MR. MATHEWS: Four year, damage to contract.

THE COURT: I thought it was a breach of [12-81] contract.

MR. MATHEWS: No. The usually analogy is to tortious interference. We have no contract with Allied.

THE COURT: That is true.

MR. MATHEWS: Tortious interference or damage to property. I think it is a four-year statute in Massachusetts.

THE COURT: No, it is not.

MR. MATHEWS: Three years. The boycott ended on June first or second, 1981, so they would have to bring their course by '84.

THE COURT: But we have a cause of action back to Rule 15.

Ms. DeBENEDICTIS: We filed our motion under 15(a), your Honor.

THE COURT: So it is a question of relation back, and it has to relate back generally to the basic claim that it was originally in the case.

Ms. DeBENEDICTIS: The claim has never changed, your Honor.

THE COURT: Yes, but the claim originally was that of Allied International and not that of the other Allied corporations, so for purposes of this case, I suppose an argument can be made that all that has been acquired by Allied Plywood

Corporation and all that is [12-82] carried forward now is the claim of Allied International for lost profits over the period, plus such claims for the period after the acquisition — well, I'm not sure about that. I suppose the question is whether the Allied Corporation can make a claim now for its loss of profits other than that attributable to the International branch for the period after the acquisition, and that depends upon whether that can be fairly related back to the date of the original complaint, and that depends upon whether the defendant was put on fair notice that that was a likely claim that was going to be made against them.

Isn't that how the sequence goes, something like that? Have I got the sequence right?

Ms. DeBENEDICTIS: I believe so, your Honor.

I think that in response to that argument, which is the second prong of their argument, that the business was always carried on the same. If you remember correctly, we had all the different Allied corporations prior to the business.

THE COURT: I know. But only one of them was a plaintiff here.

Ms. DeBENEDICTIS: That's correct.

THE COURT: That creates a problem for you.

[12-83] Ms. DeBENEDICTIS: Subsequent to the acquisition, financial statements refer to Allied Plywood Corporation and subsidiaries. But prior to the acquisition, the financial statements were always filed jointly, the financial statement of all Allied Plywood Corporation. They were treated as a whole financially.

THE COURT: Except they did not show up here as plaintiffs.

Ms. DeBENEDICTIS: I would argue in effect the claim certifying International was asserted on behalf of the whole group of Allied companies.

THE COURT: Does it say that anywhere in the complaint?

Ms. DeBENEDICTIS: I'll check it, your Honor.

THE COURT: I doubt it.

Okay. Press on.

Ms. DeBENEDICTIS: Upon the April, 1981 sale of assets, the branches became part of Allied Plywood Corporation, the present plaintiff. We represent to you that this was a unitary business that operated as a whole both prior to the April, '81 acquisition, and after the '81 acquisition. And we say that the new Allied Plywood Corporation succeeds to the branches' rights in the same way that it did to International's. [12-84] And we cite you a case on Page 12 of a brief that we're filing today which is National Homes Corporation versus Lester Industries. And there the Court said, "Where corporations are closely intertwined, Courts have recognized that one named as a party plaintiff has the right to protect both against wrongdoers."

So, your Honor, other than reading the brief, which we cite this case and another one with the same proposition, that is in essence my argument which has been the same since we tried to amend it under 15(a).

I think 15(a) takes care of the statute of limitations problem.

THE COURT: All right.

MR. MATHEWS: Well, your Honor, I think you have a handle on what the issue is. I just want to explain a few things for our position.

With respect to the eight known plaintiff corporations, the other Allied corporations you read that complaint, and you don't know they are in existence. You didn't know it; the First Circuit didn't know it; we never knew it until about 1983. How you can get a claim for them in there is beyond me.

It is a claim for Allied International who imports Russian wood. Nothing about the sale of domestic wood, nothing that they sell to their best—no [12-85] what they are doing here, your Honor. They are related corporations which are their

best customers, but they are also the plaintiffs in the action. They are the ones whose business they are supposed to have lost. It is crazy. They don't get it for the A corporation.

What they have is the cause of action that was assigned by Allied International along with the other assets that were acquired by Allied Plywood. And the real question is what is the scope of that cause of action? We say it doesn't encompass the other eight corporations, and we say that cause of action died as of the date of the sale.

Now, this may be merely a question of causation. If Allied International, the old Allied International, had no profits after April, '81, because Mr. Waldfogel elected to take the purchase price rather than continue in the wood business—Allied International, he testified, is still in existence. It is an investment company now; out of wood.

Let's say if you have a corporation, you might have International. Mr. Waldfogel decides he is tired of wood and wants to make his millions in TV. He discontinues the wood business and goes into it and he probably would make his millions in TV, but he can't then say it was the ILA boycott that kept him from having wood profits after he [12-86] decided to abandon that business. So our whole position is they have the assigned cause of action. International certainly has no claim on behalf of this new entity, which didn't even exist when they brought the suit, the damages that they lost.

Someone starts in the wood business in the middle of a boycott, you've got problems there,too. Didn't he jump in front of the speeding car? He knew there was a boycott. Or he took it into account on the price he paid that there was a boycott. They don't have any claim in their own right.

THE COURT: We have no evidence about the pricing, do we?

MR. MATHEWS: The pricing of the corporation, no, they didn't put it in.

THE COURT: You haven't put it in either that that was taken into account in pricing the wood.

MR. MATHEWS: No, we haven't. But the thing is, this, it is very clear, your Honor said, they do not in any way claim that the motivation for selling the assets was the ILA boycott.

THE COURT: No.

MR. MATHEWS: He couldn't stand it any more so he sold it. He did it for his own personal reasons. If he wants to elect to get out of the wood business, he [12-87] forfeited profits on the wood business.

THE COURT: He didn't elect to do it. He is very much in it.

MR. MATHEWS: He went to the new entity and got the job. Allied International, the plaintiff in this case, who assigned the cause of action, whose parameters we're examining got out of the wood business and went into the investment business.

[12-88] THE COURT: They assigned the cause of action.

MR. MATHEWS: That cause of action is only Allied International's cause of action. Let's say there had been no assignment and Allied just went out of business in April of 1981 and went into investment, sold its assets off, one warehouse there and one warehouse there, just went out of business. Could it come in and say, "Oh, we didn't go out of business because it was your fault. We had no profits from the sale of wood. Of course, they don't. Now they're an investment. So we say that the loss of profits after 1981 is no part of the assigned cause of action which is the only cause of action before this Court.

Therefore, it's much too late to preclude evidence. But that they cannot recover for lost profits after the date of the sale.

THE COURT: Unfortunately, this business of collective corporate structures is usually dictated by the tax man and hasn't much to do with anything else.

MR. MATHEWS: But—

THE COURT: It was typical for an organization to set up all these separate corporations before the Tax Reform Act of 1969, I think it was, because then they could all, they could split the income and break things down. And after the Tax Reform Act of 1969, I have been [12-89] trying to get my clients to consolidate, and they thought they had been so smart with all these wonderful corporations, it took the lawyers five or six years to persuade them to do what Allied did and get rid of all this nonsense.

MR. MATHEWS: But wait.

THE COURT: This was the sort of thing that went on all the time. If we tried to substitute all of this corporate hanky-panky for whatever, for the real flow of the economic interests here, I think we are going to get in an awful mess.

MR. MATHEWS: I'm talking about the distinction between Allied International and Allied Plywood. Allied International was owned by Waldfogel and Gilday. Allied Plywood is owned 85 percent by someone else. It's not just a change of operation. It's a whole new corporation.

Along the lines that I said, when people did do this for tax reasons, and I can recite it, if you want to do it for those reasons, you're stuck with it.

THE COURT: Okay.

Ms. DeBENEDICTIS: Your Honor, on this point, about whether or not the transfer was accomplished of the claim as of the date of the acquisition, I think there is no doubt you're absolutely right. There is case law. I have several cases in my brief. There doesn't have to be a unity. It would have been accomplished even if [12-90] Mr. Waldfogel and Mr. Gilday were not 20 percent stockholders in the new Allied Corporation. It's a red herring that Allied International still exists as an investment company. Again, the cases say that has nothing to do with anything. What has to do with the question is what the transfer—did the transfer of the claim take place? And the

cases even go as far as saying it doesn't have to be a transfer of the claim in writing the way there was here.

THE COURT: I'll take it under advisement.

MR. MATHEWS: Could I have one more point?

Let's just imagine they didn't assign that cause of action but that Allied International, as one of its investments, invested in this lawsuit of what we can get from the ILA. They sold the other assets. Plywood is operating the wood business but International is pressing this lawsuit.

Now, I don't think in that circumstance, you would hear evidence of Plywood's losses.

You say to International, Show your losses. They show them up to '81, and then they had no more losses because at that point they went into the investment business.

THE COURT: Is that it?

Ms. DeBENEDICTIS: Can I say just one thing?

I want to direct your attention to under [12-91] 15A, there has been no change here in the essential nature of the lawsuit by the amendment. That is all. Basically, it hasn't changed the evidence.

THE COURT: That is the question.

Thank you very much.

Ms. DeBENEDICTIS: Thank you.